In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

STOECO HOMES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 498 F. 2d 597. The opinion and order of the district court (App. B, *infra*) are reported at 359 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on May 23, 1974. A timely petition for rehearing was denied on July 31, 1974 (App. D, *infra*). On October 29, 1974, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Brennan to and including November 28, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a developer of a community adjacent to a navigable waterway must obtain a federal permit under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, to excavate navigable lagoons extending the waterway to his lot fronts.

STATUTE INVOLVED

Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 403, provides:

> That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

STATEMENT

In 1951, Stoeco Homes, Inc. (Stoeco), obtained a permit from the Corps of Engineers under the 1899 Rivers and Harbors Act to excavate two canals on a filled salt marsh it owned in Ocean City, New Jersey. The land where the canals were to be dug was adjacent to Great Egg Harbor, on the Intercoastal Waterway, a navigable waterway of the United States (App. A, *infra,* pp. 2A–4A; 498 F. 2d at 600–601). The permit required that the work be completed by December 31, 1955, and that was done (*ibid.*). Some ten years later, without obtaining an additional permit from the Corps of Engineers, Stoeco began a more ambitious project of dredging five lagoons at right angles to one of the canals, along which it intended to create a number of waterfront lots (App. A, *infra,* p. 4A, 498 F. 2d at 601). In 1971 after several of the lagoons had been completed and another was being started, the unauthorized excavation was brought to the attention of the Corps of Engineers and it demanded that Stoeco cease further dredging and filling until it had applied for and received a permit under the 1899 Rivers and Harbors Act (App. B, *infra,* p. 27A; 359 F. Supp. at 675). Upon Stoeco's refusal to do so, the United States brought suit to enjoin Stoeco from conducting dredge, fill and construction activities in the area in question in violation of Sections 10 and 13 of the Act.[1] Section 10 (*supra,*

[1] Paragraph 9 of the government's complaint specifically alleged that respondent had "altered and modified the course, location, condition and capacity of South Harbor and the Intercoastal Waterway * * *."

p. 2) makes it unlawful to "alter or modify the course, location, condition, or capacity" of navigable waters, without a permit. Section 13, 33 U.S.C. 407, makes it unlawful to deposit refuse in navigable waters without a permit.

The district court granted the injunction (App. B, *infra*). It found the lagoons dug by respondent to be navigable waters supporting "various-sized crafts, including fifty-foot oceangoing vessels, as well as pile drivers and dredges of substantial size" (App. B, *infra,* p. 29A; 359 F. Supp. at 676), and that in dredging and filling respondent had engaged in "direct discharges of dark sludge material into South Harbor and Cayman Harbor" and had allowed run-off, and "blow-outs" of dikes ("*i.e.,* the collapse of dikes into the water, which occur because defendant has overburdened the fill area with dredge spoils"), to "shoal" South Harbor (*ibid.*). The court further found that the dredging and filling was not shoreward of established harbor lines, and thus was not excepted from the requirement of federal permits under Section 10 of the Act (App. B, *infra,* p. 33A; 359 F. Supp. at 678).[2]

Accordingly, the court found that respondent's dredging of the finger lagoons and filling of the adjacent land without the consent of the Corps of Engineers, "have obstructed, altered and modified the

[2] Additionally, the court held that the land where the dredging had taken place was itself a navigable wet-land area that had previously been illegally filled but that "* * * its character, in legal contemplation, as part of the navigable waters of the United States [remained] * * *" (App. B, *infra*, pp. 30A–31A, 359 F. Supp. at 676–677).

course, location, condition and capacity of" navigable waters in violation of Section 10 of the Act, and that the dredging and filling operations deposited waste in violation of Section 13. Consequently, the United States was entitled "to a permanent statutory injunction interdicting a continuation of [respondent's] dredge, fill and construction activities * * *" (App. B, *infra,* p. 36A; 359 F. Supp. at 679).[3]

The court of appeals vacated the injunction (except, temporarily, as to hydraulic dredging) and remanded the case to the district court (App. A, *infra,* p. 24A; 498 F. 2d at 612). It held that the lands in question had been lawfully filled many years ago and were fast lands at the times the canals and later lagoons were excavated. Consequently, the court reasoned, Section 10 of the Rivers and Harbors Act, which applies only to navigable waters, did not apply.[4] As to Section 13, the court held that the discharges from dredging had not been shown to be such as would be prohibited by the Corps of Engineers but that "[n]o hydraulic dredging should be permitted until such time as Stoeco obtains an appropriate discharge permit" under the Federal Water Pollution Control Act Amendments of 1972 (App. A, *infra,* p. 24A; 498 F. 2d at 612).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals unduly constricts the government's control over modifications to harbors and other navigable waterways, contrary to

[3] Section 12 of the Act, 33 U.S.C. 406, authorizes injunctive relief for violations of Section 10.

[4] See n. 5, *infra.*

Section 10 of the 1899 Rivers and Harbors Act and decisions of this Court. Excavation of finger lagoons adjoining a harbor is as much an alteration of that body of water as is construction of a pier creating a similar increase of docking facilities. Indeed, it is a greater alteration because it physically changes the configuration of the water and bank, and, as the present case shows, creates a danger of washouts and other obstructions to navigation and lowered water quality.

The court of appeals' refusal to recognize that Stoeco's project does "alter or modify the course, location, condition or capacity" of the navigable waterways affected here, even though the lagoons are cut into fast land, is a narrow and unrealistic application of the 1899 Act,[5] in contrast to this Court's broad interpretations of the Act in *United States* v. *Pennsylvania Chemical Corp.*, 411 U.S. 655, 669–670;

[5] Inexplicably, the court of appeals stated (App. A, *infra*, p. 10A; 498 F. 2d at 604): "The government does not contend that by excavating (the silting problem aside) Stoeco is modifying 'the course, location, condition, or capacity' of Great Egg Harbor. See § 10." The government's brief in that court, however, made precisely that contention as follows:

> With regard to the third clause of § 403, it is beyond dispute that defendant's dredge, fill and construction activities have altered and modified the course, location, condition, and capacity of Plan Six itself, as well as each of its lagoons and the Intracoastal Waterway, in clear the [sic] violation of the statute. The excavation of two new lagoons would undoubtedly have the same effect. [Brief, Point I, p. 22]

And, as noted in the Statement (*supra*, n. 1, and pp. 4–5), that contention has specific foundation in both the allegations of the government's complaint and the findings of the district court.

United States v. *Standard Oil Co.*, 384 U.S. 224, 226, 230; and *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491. In particular, the decision below conflicts with this Court's approach to Section 10 of the Act in *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, where it was held that that section prohibited the drawing-down of the water of Lake Michigan through a canalization of the Chicago River. The Court there stated (266 U.S. at 429; emphasis added):

> There is neither reason nor opportunity for a construction [of Section 10] that would not cover the present case. As now applied it concerns a *change in the condition of the Lakes* and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their *navigable capacity* * * *.

Similarly, as we have shown, Stoeco's excavation of lagoons changes the condition of the navigable waters to which they connect, through (among other things) washouts, deposits, and changes in traffic.

2. The decision below conflicts in principle with the Fifth Circuit's decision in *United States* v. *Joseph G. Moretti, Inc.*, 478 F. 2d 418, 428, holding Section 10 applicable to finger lagoons excavated for a seafront housing development. It is, in our view, an immaterial distinction that while Stoeco's development was constructed by excavating inland from the existing waterway, the Moretti development was constructed primarily seaward. Indeed, because it adjoins the Intercoastal Waterway, the effect of the Stoeco development on navigation is probably considerably

greater than that of the Moretti development. See *Moretti, supra,* 478 F. 2d at 421, n. 3.

The decision below also conflicts in principle with *United States* v. *Perma Paving Co.,* 332 F. 2d 754 (C.A. 2), in which the court held a riparian owner liable under Section 10 for the cost of removing shoals created by his overloading of riparian land. The Second Circuit there, in an opinion by Judge Friendly, properly focused on the effect of the overloading on the navigable waters, deeming it immaterial that the overloading occurred on fast land. Here, *a fortiori,* where the navigable water is directly altered by the excavation of adjoining lagoons, Section 10 should be held applicable.

Moreover, the decision of the court below not to apply Section 10 to the excavation of canals connecting with navigable waters directly conflicts with the decisions of two district courts in the adjacent Fourth Circuit. *United States* v. *Warren G. Whichard,* E.D.N.C., No. 797, decided February 6, 1974; *United States* v. *Edward W. Mitchell,* D.S.C., Civil No. 73–1125, decided June 3, 1974. Neither of these cases was appealed.[6]

3. Even if the decision below were limited to the states within the Third Circuit, it would affect the important coastal and inland waterways of New Jersey and Delaware. These waterways are subject to heavy navigation as well as to considerable pressure for residential and commercial development. Protection of these waterways is a federal responsibility and Sec-

[6] The cases, to date, have not been officially reported. We are supplying the Clerk and opposing counsel with copies of the opinions.

tion 10 of the Rivers and Harbors Act is a major instrument for such protection. If developers were to be allowed to excavate canals cutting into these waterways without federal consent, and thus to increase the boat traffic on the waterways and the risks of impediment to navigation at will, effective protection of the navigable waterways and coastal environment would be seriously impeded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

HARRY R. SACHSE,
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EDMUND B. CLARK,
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Attorneys.

NOVEMBER 1974.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1805

UNITED STATES OF AMERICA

v.

STOECO HOMES, INC.,
a corporation,

Appellant.

(D.C. Civil Action No. 1335-72)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued March 14, 1974

Before ALDISERT, GIBBONS and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed May 23, 1974)

GIBBONS, *Circuit Judge*

The defendant Stoeco Homes, Inc. (hereinafter Stoeco) appeals from an order issued in a suit by the United States of America which permanently enjoined Stoeco from engaging in or permitting any dredge, fill or construction operations in an area in Ocean City, New Jersey, bordered by Bay Avenue, Tennessee Avenue, Spruce Road, and the Back Thorofare of the Intercoastal Waterway, without the prior recommendation of the Army Corps of Engineers and approval of the Secretary of the Army. The government's suit alleges violations of the Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1151, 33 U.S.C. § 401 et seq.

Stoeco has for many years been engaged in the creation of waterfront homesites by dredging and bulkheading lagoons and pumping the dredged materials to adjoining uplands. It acquired the premises in question in 1951 from Ocean City.[1] At the time of this acquisition the land area was substantially above mean high tide. The government contends, however, that prior to 1927 the entire area was a salt water marsh, subject to the ebb and flow of the tide,

1. Stoeco also obtained from the State of New Jersey a conveyance of the State's interest in land flowed by tidewater. Exhibit P-26. *See* page 26 *infra*.

and that in 1927 R.L. Chester Company, the City's predecessor in title, hydraulically filled the marsh to form firm land suitable for residential development. The land, in 1951, was vacant and overgrown by bayberry. It was bounded on the southwesterly side by Tennessee Avenue, an improved street, on the southeasterly side by Bay Avenue, an improved street, on the northeasterly side by Spruce Road and irregularly on the north, northwesterly and westerly side by Back Thorofare, a part of the Intercoastal Waterway passing through Great Egg Harbor Bay, a tidal estuary. In October 1951 Stoeco filed with the Army Corps of Engineers a plan (Page 6 of Exhibit P-19) to dredge from Back Thorofare to the premises in question two separate waterway openings. The plan discloses an intention to create, within the premises in question, two separate internal waterway systems. The more northerly opening was to be 500 feet wide at the 1951 high water line. The lagoon system developed off that entrance, now known as Sunny Harbor, does not figure in this litigation. Off the more southerly opening Stoeco proposed to construct what is now known as South Harbor. South Harbor and its tributaries is the subject matter of this litigation and will be described more fully hereafter. On November 2, 1951 the Army Corps of Engineers granted a permit to dredge the two openings to Back Thorofare provided the work was completed by December 31, 1955. The two openings to Back Thorofare were completed within the specified time and the work was inspected and approved by the Army Corps of Engineers on June 16, 1955. (Page 2 of Exhibit P-19) Thereafter work on the internal lagoon systems was suspended while certain resident taxpayers of Ocean City challenged the validity of Stoeco's title. The contention was that the grantee had not improved the area as rapidly as the conveyance contemplated, and that there should be a forfeiture. *See Oldfield v. Stoeco Homes, Inc.*, 26 N.J. 246, 139 A.2d 291 (1958). After that litigation terminated in its favor Stoeco resumed its development, but with a re-

vised plot plan. No change was made in the openings to Back Thorofare, but within the premises in question the lagoon arrangement was revised from that shown on the 1951 application. It should be understood that the 1951 application dealt only with access to the Intercoastal Waterway, not with the internal lagoons. The change, insofar as the South Harbor area is concerned, was from an arrangement in which, from a point near the access to Back Thorofare the harbor was to divide into two long lagoons running parallel to Tennessee Avenue toward Bay Avenue, to an arrangement in which one wider lagoon was to be excavated, running parallel to Tennessee Avenue toward Bay Avenue (South Harbor) and off this main channel, at right angles, parallel to Bay Avenue, five additional lagoons would be excavated on each side. No application was made to the Army Corps of Engineers with respect to the modified plan.

In August 1972, when this suit commenced, the Sunny Harbor part of the development had been completed, sold as homesites and occupied. South Harbor had been completely excavated from Back Thorofare parallel to Tennessee Avenue to a point near Bay Avenue. Off the northeasterly side of South Harbor the five perpendicular lagoons had been completely excavated. These lagoons had been bulkheaded, as had the northeasterly side of South Harbor. All the land on that side of South Harbor had been sold off as homesites, and homes had been erected and occupied. The area between South Harbor and Tennessee Avenue remained undeveloped. Stoeco had substantially completed excavation of three of the five perpendicular lagoons, and had partially completed bulkheading of those three. On April 23, 1971 the Army Corps of Engineers had for the first time taken the position that the South Harbor operations required a permit. Stoeco contested that position and continued operations until enjoined.

Stoeco's method of excavation is to dredge a mixture of solids and water from the excavated area to an upland area surrounded by a manmade dike. The heavier solids settle within the dike and the water flows back, through

runoff pipes in the dike, to the lagoons already excavated. The district court found that the runoff pipes returned fines to the lagoons, which tended to cause silting in these lagoons and that occasionally the dikes failed, with a similar result. Such silting has obstructed navigation in South Harbor and in Cayman Harbor, one of the incomplete lagoons running from South Harbor toward Tennessee Avenue. These findings are not clearly erroneous. The district court also found that all of the premises in question between South Harbor and Tennessee Avenue—indeed all of Stoeco's development including those parts already built upon—is within the navigable waters of the United States. We will make more specific reference to the evidence supporting that finding hereafter.

The government contends that the foregoing establishes two violations of the Rivers and Harbors Appropriation Act of 1899. First, it contends that the discharge of silt into South Harbor and Cayman Harbor violates 33 U.S.C. § 407 (originally enacted as Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 13, 30 Stat. 1153 (hereinafter § 13)) which prohibits the discharge of refuse matter into any navigable water of the United States.[2]

2. "Deposit of refuse in navigable waters generally

It shall not be lawful to throw, discharge, or deposit or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms, or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, any violation thereof shall be unlawful."

Next, it contends that even if the silting were prevented, since the entire premises in question, though substantially above mean high tide at present, is within the navigable waters of the United States, excavation of the lagoons without a permit violates 33 U.S.C. § 403 (originally enacted as Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151 (hereinafter § 10)).[3] The district court accepted both contentions and issued an injunction not only against silting of the lagoons but against any improvement of the premises without an Army Corps of Engineers recommendation and an authorization by the Secretary of the Army. Stoeco contends on appeal: (1) that the silting did not take place in the navigable waters of the United States, (2) that even if it did the injunction in its present breadth cannot be sustained on that basis, and (3) that the government has not established that the premises in question are within the navigable waters of the United States.

I. The § 10 Violation

Since, the broadest government contention, that all of Stoeco's land—indeed all of the land it has developed and sold off—is within the navigable waters of the United States, would, if accepted, amply justify the court's broad injunction, we start our analysis with this § 10 claim.

That claim must be considered in light of the fact that the government's permit policy with respect to § 10 was

3. "Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

changed in 1970. Prior to May 27, 1970 it was the policy not to require § 10 permits for construction shoreward of established harbor lines. That policy is reflected in Exhibit P-19, page 23.[4] On May 27, 1970 the Army Corps of Engineers announced a new policy, 35 Fed. Reg. 8280 which appears at 33 C.F.R. § 209.150:

"(a) *Definition.* The term 'harbor line(s)' is used here in its generic sense. It includes types of harbor lines frequently referred to by other names, including, for example, pierhead lines and bulkhead lines.

(b) *Policies, practices and procedures.*

(1) Under previous policies, practices and procedures, riparian owners could erect open pile structures, or undertake solid fill construction shoreward of established harbor lines without obtaining a permit under 33 U.S.C. 403. This was a matter of great concern, particularly in cases involving long established harbor lines, since all factors affecting the public inter-

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"WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
14th Floor, Penn Mutual Life Insurance Bldg.
Independence Square
Philadelphia, Pa.

19 January 1949

Stoeco Homes, Inc.
800 Ocean Avenue
Ocean City, New Jersey

Gentlemen:

Receipt is acknowledged of your letter of 15 January 1949, in reply to letter from this office dated 10 January 1949, inclosing a sketch of work being undertaken by your company along Great Egg Harbor north of Ninth Street, Ocean City, New Jersey.

Inasmuch as no construction is contemplated channelward from the existing bulkhead at the locality and the dredging for a boat basin is shoreward from the line of the bulkhead, no Department of the Army permit for the work will be required.

FOR THE DISTRICT ENGINEER:

Very truly yours,
ROBERT C. MARSHALL
Major, Corps of Engineers
Assistant District Engineer
Works"

cc: Resident Engineer
Atlantic City, N.J.

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est may not have been taken into account at the time the lines were established. Accordingly, under previous policies, practices and procedures there was the danger that work shoreward of existing harbor lines could be undertaken without appropriate consideration having been given to the impact which such work may have on the environment and without a judgment having been made as to whether or not the work was, on balance, in the public interest.

(2) In order to assure that the public interest will be considered and protected in all instances, all existing and future harbor lines are declared to be guidelines for defining, with respect to the impact on navigation interests alone, the offshore limits of open pile structures (pierhead lines) or fills (bulkhead lines). A permit under 33 U.S.C. 403 will be required in each case for any work which is commenced shoreward of existing or future harbor lines after the date of publication of this regulation in the FEDERAL REGISTER. Applications for permits for work in navigable waters shoreward of harbor lines shall be filed and processed in accordance with the provisions of applicable sections of this part. For work already completed or commenced in conformance with existing harbor line authority before that date, no permit is required."

Stoeco contends that the 1951 permit was granted under the former policy, and that the only work which was done seaward of harbor lines established in Back Thorofare was that permitted by the 1951 permit. The district court ruled:

"Defendant argues that the Government established federal harbor lines or ratified State harbor lines and that as a result it was relieved of the requirement to obtain a permit for work done shoreward of

those harbor lines. This is incorrect in fact and in law. The Federal Government has not established harbor lines in the Back Thorofare area, nor has it, otherwise, ratified or adopted whatever State harbor lines may exist in this area. The presence of federal harbor lines, however, is irrelevant to the requirement of obtaining an appropriate federal permit for work in navigable waters." *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672, 678 (D.N.J. 1973).

This ruling makes no mention of 33 C.F.R. § 209.150, and is inconsistent with the apparent meaning of that regulation. The regulation appears to refer to actual harbor lines established by any authority. Exhibit P-19 suggests strongly that at least in 1951 the Army Corps of Engineers recognized some harbor lines in Great Egg Harbor seaward of the former marshlands developed by Stoeco. The Secretary of the Army has authority to establish harbor lines. 33 U.S.C. § 404 (originally enacted as Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 11, 30 Stat. 1151 (hereinafter § 11)).[5] The Government offered no evidence that after South Harbor was excavated the Secretary of the Army established such lines in South Harbor. We are hampered in our consideration of the possible effect of 33 C.F.R. § 209.150(b)(2) by the fact that the district court

5. "Establishment of harbor lines; conditions to grants for extension of piers, etc.

Where it is made manifest to the Secretary of the Army that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: *Provided*, That whenever the Secretary of the Army grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tidewater displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tidewater channels between high and low water mark, to such an extent as to create a basin for as much as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him."

made no reference to it. If that provision applies, it together with the 1951 permit, would seem to justify continuance of Stoeco's project without a further permit, even if the premises in question is within the navigable waters of the United States.

Assuming for discussion, however, that 33 C.F.R. § 209.150(b) (2) does not apply, the government's attempt to require a permit now depends upon a showing that the solid land which Stoeco is excavating is within the navigable waters of the United States. The government does not contend that by excavating (the silting problem aside) Stoeco is modifying "the course, location, condition, or capacity" of Great Egg Harbor. *See* § 10. It rests its right to the broad injunction granted on the claim that prior to 1927 the premises in question was an estuarine tidal marsh. The Army Corps of Engineers has defined the navigable waters of the United States in 33 C.F.R. § 209.260:

> "(a) *Purpose and scope.* This section defines the term 'navigable waters of the United States' as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice, and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning 'navigable waters.'
>
> (b) *General policies.* The term 'navigable waters of the United States' is used to define the scope and extent of the regulatory powers of the Federal Government. Precise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this section are in close conformance with the tests used by the Federal courts and determinations made under this section are considered binding in regard to the activities of the Corps of Engineers.

(c) *General definition.* Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

(d) *General scope of determination.* The several factors which must be examined when making a determination whether a water body is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(1) Past, present, or potential presence of interstate or foreign commerce;

(2) Physical capabilities for use by commerce as in subparagraph (1) of this paragraph;

(3) Defined geographic limits of the water body.

* * * * *

(k) *Geographic and jurisdictional limits of oceanic and tidal waters*—(1) *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone 3 geographic (nautical) miles seaward from the coast line. Wider zones are recognized for special regulatory powers, such as those exercised over the Outer Continental Shelf.

* * * * *

(2) *Bays and estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all water bodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by para-

> graph (k)(1)(ii) of this section, 'Shoreward Limit') of all such water bodies, even though portions of the water body may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered 'navigable in law,' but only so far as the area is subject to innundation [sic] by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes."

This definition, which was promulgated in September 1972, 37 Fed. Reg. 18290, 18911 reflects the government's position that estuarine tidal marshland which was at anytime subject to inundation by mean high tide is perpetually subject to the navigational servitude of the United States. That position was accepted by the district court and has been accepted by one other district court and approved by the Fifth Circuit, at least with respect to marshland still in that state. *See United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973). *Cf. Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Stoeco challenges both the legal position and, in this instance, the factual premise for its application. It contends the finding that the area was once a tidal marsh is not supported by any reliable evidence. But more fundamentally, it challenges the constitutionality of a navigational servitude of the extent defined in 33 C.F.R. § 209.260(k)(2).

The evidence supporting the government's contention that the premises in question was once a marsh subject to the ebb and flow of the tide is hardly overwhelming. It produced Exhibit P-22, which is Atlas Sheet No. 36, New Jersey Department of Conservation and Economic Development, 1916 Revision, and the testimony of Harold Barker, Jr., an employee of the State of New Jersey. Barker testified that Exhibit P-22 showed the premises in question to be a tidal marsh in 1916, and that other State records estab-

lished that the entire area was hydraulically filled by R.L. Chester Company in 1927. The extent of ebb and flow of the tide over New Jersey's estuarine marshes has been the subject of extended and extensive litigation in the courts of New Jersey. *See, e.g., Keyport Steamboat Co. v. Farmers Transportation Co.*, 18 N.J. Eq. 511 (1866) *aff'g* 18 N.J. Eq. 13 (Ch. 1866); *Stevens v. Patterson and Newark R.R. Co.*, 34 N.J.L. 532, 3 Am. Rep. 269 (1870); *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 44 N.J. Eq. 398, 15 A. 227 (Ch. 1888), *aff'd*, 47 N.J. Eq. 598, 22 A. 1076 (1888); *Simpson v. Moorehead*, 65 N.J. Eq. 623, 56 A. 887 (Ch. 1904); *Moore v. Ventnor Gardens, Inc.*, 105 N.J. Eq. 730, 149 A. 536 (Ch. 1930) *aff'd*, 109 N.J. Eq. 132, 156 A. 419 (1931); *Ross v. Mayor and Council of Borough of Edgewater*, 115 N.J.L. 477, 180 A. 866 (Sup. Ct.), *aff'd*, 116 N.J.L. 447, 184 A. 810 (1935), *cert. denied*, 299 U.S. 343 (1936); *Harz v. Board of Commerce and Navigation*, 126 N.J. Eq. 9, 7 A.2d 803 (Ch.) *aff'd* 127 N.J. Eq. 341, 12 A.2d 879 (1939). The maps from which Exhibit P-16 was prepared have frequently been challenged. But Stoeco offered no testimony challenging the accuracy of the exhibit or Barker's interpretation. Thus we cannot say the district court's finding that the premises in question was a tidal marsh prior to 1927 is clearly erroneous.

The expansive definition of the federal government's navigational servitude may be traced to the enactment in 1958 of The Fish and Wildlife Coordination Act, Pub. L. No. 85-624, 72 Stat. 563, (codified at 16 U.S.C. §§ 661-66), and of The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, (codified at 42 U.S.C. §§ 4331-47). Prior to these enactments the chief concerns of the Army Corps of Engineers were the prevention of encroachments on the navigational capacity of waters, and the prevention of encroachments on the navigational servitude which the government intended to use for some other purpose, such as flood control, *United States v. Rands*, 389 U.S. 121 (1967) or road building, *United States ex rel.*

Greathouse v. Dern, 289 U.S. 352 (1933). The Fish and Wildlife Coordination Act requires that any federal agency granting a permit or license to modify any stream or body of water shall first consult with the United States Fish and Wildlife Service, Department of the Interior and also with the head of the agency exercising administration over the wildlife resources of the particular state, ". . . with a view to the conservation of wildlife resources". 16 U.S.C. §662(a).[6] The National Environmental Policy Act of 1969 requires that for every major federal action significantly affecting the human environment the federal agency shall prepare an environmental impact statement. 42 U.S.C. §4332(c). That requirement is applicable to major federal actions by the Army Corps of Engineers. *E.g., Environmental Defense Fund, Inc. v. Froehlke*, 477 F.2d 1033 (8th Cir. 1973). Neither The Fish and Wildlife Coordination Act nor The National Environmental Policy Act by their terms apply to State or private activities, although undoubtedly Congressional legislative power under the Commerce Clause would be broad enough to encompass federal regulation of any activities affecting the marine ecology. It is clear that Congress intended that the Army Corps of Engineers and the Secretary of the Army would consult with the Fish and Wildlife Service before issuing a permit for a private dredge and fill operation. *See* S. Rep. No. 1981, 85th Cong. 2d Sess. (1958) (reprinted in 2 1958 U.S. Code Cong. & Ad. News 3446-50). The federal environmental protection statutes did not, however, by their terms enlarge the jurisdiction of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899. If there is no such jurisdiction environmental protection is still a matter primarily of state concern. We turn, then, to the nature and extent of the federal navigational servitude.

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6. Compare The Fish and Wildlife Act of 1956, ch. 1036, 70 Stat. 1119 (codified at 16 U.S.C. §742i) in which Congress deferred, to some extent, to State regulation over submerged lands.

We are not dealing with any claim of federal title to the premises in question. It is not located in the coastal zone, but within the boundaries of the State of New Jersey. It is settled law that riparian titles within those boundaries are derived from the State. *See, e.g., Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Hoboken v. Penn Railroad Co.*, 124 U.S. 656 (1888); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Bailey v. Driscoll*, 19 N.J. 363, 117 A.2d 265 (1955); *Shultz v. Wilson*, 44 N.J. Super. 591, 131 A.2d 415 (1957); *River Development Corporation v. Liberty Corporation*, 51 N.J. Super. 447, 144 A.2d 180 (1958); *Island Heights v. Presbyterian Camps*, 68 N.J. Super. 291, 172 A.2d 228 (1961); *Transcontinental Gas Pipeline Corp v. The Department of Conservation and Economic Development of New Jersey*, 43 N.J. 135, 202 A.2d 849 (1964). *Compare United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950). Thus neither the relinquishment of title in § 3 of the Submerged Lands Act of 1953, 43 U.S.C. § 1311(b)(1), nor the reservation of a federal navigational servitude in § 6 of that Act, 43 U.S.C. § 1314, bear upon the issues in this case. The latter section reserves from the grant in § 3 the federal government's "navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs", but does not purport to enlarge or to define that servitude.

Nor are we dealing with the extent to which the United States must, by virtue of the fifth amendment, compensate the fee owner of premises over which, or adjoining which, it has a navigational servitude, when it takes the premises for federal purposes. Existence of a dominant federal navigational servitude has long been assumed. *See, e.g., Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 724 (1865); *South Carolina v. Georgia*, 93 U.S. 4 (1876). It is clear that for purposes of the fifth amendment the fee owner's interest is

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valued subject to the navigational servitude, regardless of the purpose of the federal taking. *See, e.g., United States v. Rands*, 389 U.S. 121, 122 (1967). *Cf. United States v. 50 Foot Right of Way in Bayonne New Jersey*, 337 F.2d 956 (3d Cir. 1964). The government points to the condemnation cases as suggesting a broad reading of the extent of the navigational servitude. But those cases cannot be read as defining the extent of the servitude.

None of the condemnation cases to which we have been referred deal with whether, after the government has permitted improvements within the tidal waters of the United States, either as a result of a permit or by inaction, it can cause the removal of those improvements without paying compensation. Since it is established that the premises in question has been improved solid upland at least since 1927, we must determine (1) whether estuarine tidal marshland was subject to the federal navigational servitude prior to 1927, if so, (2) whether the servitude survived the 1927 improvements to which the government made no objection, and finally (3) whether Congress intended that §10 was intended to have continuing application to improved land formerly within the navigable waters of the United States. The third question is of enormous significance to property owners in estuarine areas of New Jersey and other coastal states in the northeast where, perhaps unfortunately, since at least the middle of the nineteenth century there has been extensive development of estuarine marshland. If the permit provisions of that section apply to the premises in question, improved as solid uplands since 1927, they apply as well to thousands of acres of streets, homesites, factory sites and railyards.

We can put aside the question whether under the Commerce Clause Congress could extend the regulatory jurisdiction of the Army Corps of Engineers to excavations on solid uplands. In the statute on which the government relies Congress did not do so. It extended that jurisdiction only to the navigable waters of the United States. What

those waters comprise has been the subject matter of an extensive jurisprudence, not all of it completely reconcilable.

A good starting point is Justice Bradley's opinion in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888)[7] holding that in the absence of a congressional enactment a state could authorize the obstruction of a navigable stream. He wrote:

> "The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced, (a point which we do not undertake to decide,) it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States."

In reaction to *Willamette Iron Bridge Co. v. Hatch, supra*, Congress passed the Act of Sept. 19, 1890, ch. 907, § 10, 26 Stat. 454, prohibiting "[T]he creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction . . .". That statute was superseded by the

7. Bradley distinguished *The Wheeling Bridge Case*, 54 U.S. (13 How.) 518 (1851) as resting upon the interstate compact pursuant to which Kentucky was admitted to the Union, with guaranteed free navigation of the Ohio River. Probably that interpretation of *Wheeling Bridge* which antedated the decision in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), is correct, since until the *Genesee Chief* the Ohio at Wheeling would not have been considered to be in the navigable waters of the United States. *See* page 23 *infra*.

1899 Act of which § 10 is a part, and which contains the same "navigable capacity" language. Both statutes were enacted pursuant to the Commerce Clause, but neither reached the full extent of Congressional power over commerce. That power was exercised in 1890 to protect "waters in respect of which the United States has jurisdiction" and in 1899 to protect "waters of the United States." Congress obviously adopted the judicial definition of those waters as of 1890. That definition was the admiralty definition. The classic statement was in Justice Field's opinion in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). Justice Field wrote:

> "The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the

> meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." [footnote omitted]

Stoeco urges that this definition excludes the premises in question, since although the government established that the marshland was subject to the ebb and flow of the tide in 1927, no showing was made that there ever was actual or even potential use for maritime commerce. Superficially the *Daniel Ball* definition would not seem to apply to a tidal marsh. But a more thorough analysis is required, since Congress adopted the admiralty definition, and that jurisdiction existed from 1789 forward. When Section 9 of the Judiciary Act conferred admiralty jurisdiction upon the district courts, what was referred to was the pre 1789 admiralty jurisdiction. A commentator suggests that colonial commissions and patents granting admiralty jurisdiction contemplated all ". . . places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, from all first bridges toward the sea." 4 Benedict on Admiralty 435 (6th ed. 1940). That commentator suggests that this definition of admiralty jurisdiction reflected the successful effort of the law courts in England to confine admiralty jurisdiction. Justice Story in *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825) accepted the English definition, holding that navigation on the Missouri River was not within the admiralty jurisdiction because that river was not tidal. *See also The Planter*, 32 U.S. (7 Pet.) 324 (1833); *The Steamboat Orleans*, 36 U.S. (11 Pet.) 175 (1837). But in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851) Justice Taney made a new start in a case involving a ship collision on the

non-tidal Lake Ontario. Congress had in 1845 passed a statute, 5 Stat. 726, extending the district court's admiralty jurisdiction to the Great Lakes and navigable waters connecting the same. It was suggested that the jurisdiction could be sustained under the Commerce Clause, but this would have presented serious constitutional problems both under the seventh amendment and under article III, section 2. Instead relying on the jurisdiction conferred in §9 of the 1789 Judiciary Act, Taney redefined navigable waters, for purposes of admiralty jurisdiction, as dependent upon the actual navigable character of the water rather than the ebb and flow of the tide. The well known definition in *The Daniel Ball, supra,* is derived from *The Genesee Chief.*

Stoeco would have us read *The Daniel Ball* and *The Genesee Chief* as both an expansion and a contraction of admiralty jurisdiction; an expansion to non-tidal waters and a contraction, in tidal waters, to areas of actual or reasonably potential navigability. There is no reason to believe that anything other than expansion was intended, however. Subsequent decisions of the Supreme Court do not suggest any contraction. None of those cases, we must concede, deal precisely with the tidal marsh issue. Stoeco urges that *Leovy v. United States,* 177 U.S. 621 (1900) is authority for the proposition that *The Genesee Chief* represents a contraction as well as an expansion. That case, involving the erection of a dam at Red Pass, on the Mississippi River in Louisiana, does stand for the proposition that a showing of actual capacity for navigation must be made before the 1899 Act applies. But it deals, so far as the opinion discloses, with a dam at a non-tidal location. In non-tidal waters the test is actual or reasonably potential navigability. In tidal waters the test, in our view, remains what it was before 1851, the ebb and flow of the tide. And since it is clear that the 1899 Act and its 1890 predecessor were intended to adopt a definition of navigable waters at least as wide as the admiralty jurisdiction (though Con-

gress could under the Commerce Clause have gone further) we hold that a § 10 applies to tidal marshes.

That holding, unfortunately, cannot end our inquiry. As the regulations quoted above make clear, under the administrative agency's prior interpretations of § 10 no permit was required in 1927 when the premises in question were filled to a level substantially above mean high tide. Stoeco acquired the premises in 1951 in a filled state, and with no notice, so far as the government has shown, that the United States claimed a navigational servitude over the entire area. The district court ruled:

> "The fact that this area has been illegally filled does not extinguish its character, in legal contemplation, as part of the navigable waters of the United States, for an area once found to be part of those waters remains so." *United States v. Stoeco Homes, Inc., supra,* at 676.

At oral argument the government took the position that even the occupants of homes on the fully developed part of the Stoeco tract remained in occupation only so long as the United States as a matter of grace declined to assert its navigational servitude. This approach is an oversimplification, for the government did not establish that the 1927 filling operation was illegal. Section 10 by its plain language contemplates congressional consent to some encroachments on the navigational servitude, and delegates to the Army Corps of Engineers and the Secretary of the Army authority to grant such consent on its behalf. If the administrative agency gives an express consent by permit in a specific instance, with no reservation of the right to compel removal, surely that consent must be considered to be a surrender of the federal servitude over the fee in question. Section 10 is silent as to the method of giving consent, but textually a blanket consent with respect to a class of properties does not appear to be prohibited. The longstanding administrative practice, at least prior to 1970, was to re-

quire consents for encroachments only beyond pierhead or harbor lines. On the record before us we must assume that this was the administrative practice when in 1927 the premises in question became fast rather than tidal land. Thus there is no basis for the district court's conclusion that in 1927 the land was illegally filled. When Stoeco purchased in 1951 what then had been fast land for twenty four years the navigational servitude had long since been surrendered. We reach this conclusion as a matter of statutory interpretation of § 10, mindful that though the Congressional power over the regulation of commerce is far reaching that power is limited by the due process and taking clauses of the fifth amendment. Certainly a construction which would, after government inactivity from 1890 to 1970, cast doubt upon the property status of thousands of acres of former tidal marshes would present problems under that amendment. *Cf. United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 665, 674 (1973).

We conclude, therefore, that the broad injunction against any construction whatsoever in the premises in question cannot be sustained on the theory that a § 10 permit is required for such construction. That holding is limited, of course, to tidal marshlands which had become fast land prior to the change in policy of the Army Corps of Engineers. Any work undertaken in estuarine areas which were subject to the ebb and flow of the tide when the Army Corps of Engineers published its new regulations asserting the navigational servitude to its full extent, are, under the terms of these regulations, now subject to the § 10 permit requirement. 33 C.F.R. § 209.150(b). The validity of these regulations is not before us.

II. The § 13 Violations

Since the broad injunction cannot be sustained on the government's § 10 theory, the injunctive remedy for the enforcement of that section contained in § 12, 33 U.S.C. § 406, is inapplicable. But South Harbor, once it was

created, became by operation of law a part of the navigable waters of the United States. Thus South Harbor (and its tributary lagoons) are within the compass of § 13. Deposit of dredge fines in those waters is prohibited by § 13. *United States v. Pennsylvania Industrial Chemical Corp., supra; United States v. Standard Oil Co.*, 384 U.S. 224 (1966). In a suit for injunctive relief to abate discharges under § 13 the plaintiff must show irreparable injury and the scope of injunctive relief must be patterned to the degree of harm. *New York v. New Jersey*, 256 U.S. 296 (1921); *Missouri v. Illinois*, 200 U.S. 496 (1906). The United States can, of course, sue to abate a public nuisance under federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). But in such a suit traditional limitations on equitable remedies are applicable.[8] No balancing of interest or need to show irreparable injury is required when an injunction is sought under § 12 to prevent erection or seek removal of an unlawful structure; a remedy we have found to be inapplicable.

The district court found that there was irreparable harm to the commercial, navigational and recreational use of the waters of South Harbor.[9] There is no evidence in the record of any commercial use other than that of Stoeco, but the finding of irreparable harm to navigational and recreational use is not clearly erroneous, and injunctive relief against the continuing deposit of dredge fines in the waters of South Harbor and its tributary lagoons was proper. But the injunction went far beyond that, prohibiting any work on Stoeco's premises whether or not a discharge prohibited by § 13 would occur.

It seems unlikely that any hydraulic dredging operation can go forward without some discharge of fines from the run off of water. Section 13 does not absolutely prohibit hydraulic dredging. If some discharge in the navi-

8. The government does not rely on § 10 of the Federal Water Pollution Control Act.

9. Stoeco does not challenge that finding. (Appellant's brief p. 27).

gable waters of the United States takes place, the Secretary of the Army may permit such deposits in limits to be defined and under conditions prescribed by him. The permit program formerly administered under § 13 is now administered under § 402 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, (codified at 33 U.S.C. §§ 1151 et seq.), and pursuant to Executive Order No. 11574, 35 Fed. Reg. 19627 (1970). The government did not in this case rely on the Federal Water Pollution Control Act, but did rely on § 13 of the 1899 Act. No hydraulic dredging should be permitted until such time as Stoeco obtains an appropriate discharge permit.

The injunction appealed from will be vacated and the case remanded to the district court for the entry of a modified injunction in accordance with this opinion. The injunction to the extent that it prohibits hydraulic dredging, shall remain in effect until the district court acts.

APPENDIX 3

UNITED STATES OF AMERICA, PLAINTIFF

v.

STOECO HOMES, INC., A CORPORATION, DEFENDANT

Civ. A. No. 1335–72.

United States District Court, D. New Jersey.

June 13, 1973.

OPINION AND ORDER

COHEN, *Chief Judge:*

In this environmental protection action plaintiff, United States of America, seeks a permanent restraining order, enjoining defendant, Stoeco Homes, Inc., from conducting dredge, fill and construction operations in an area of Ocean City, New Jersey, bordered by Bay Avenue, Tennessee Avenue, Spruce Road and the Back Thorofare sector of the Intracoastal or Inland Waterway.

This Court has jurisdiction, pursuant to the provisions of 28 U.S.C. §§ 1333 and 1345 and 33 U.S.C. §§ 403, 406, 407, 411 and 413.

Plaintiff contends that this area is part of the navigable waters of the United States and that since at least April 23, 1971, defendant has conducted these operations, without the prior approval of the United States Army Corps of Engineers (ACOE) and the Secretary of the Army, in violation of 33 U.S.C. §§ 403 and 407. It is further alleged that these operations constitute a public nuisance in violation of federal common law and that they have irreversibly

altered the natural condition of the development site and irreparably damaged the environment.

Defendant responds that it has not conducted its activities within the navigable waters of the United States, and, alternatively, that even if it has operated in navigable waters, it has not violated federal law because its operations were conducted in an area shoreward of federally established or federally approved New Jersey State harbor lines where, it contends, a permit is not required. Defendant also denies that it has irreversibly altered the natural condition of the area or irreparably caused any harm to the environment. The defenses of estoppel and laches are also asserted against the Government, as well as unconstitutional violations of equal protection in the inconsistent enforcement of the statutes.

The facts out of which this controversy arose are as follows:

Sometime in 1965 defendant, a corporation under the laws of the State of New Jersey, commenced dredging, filling and construction activities, including bulkheading, road construction and housebuilding, in the above-described area of Ocean City, New Jersey. This area, which defendant designated as Plan No. Six of Stoeco Riviera (Plan Six), is a lagoon development comprised of several man-made building lots and nine basically similar finger lagoons which perpendicularly radiate from a main channel known as South Harbor. All of these lagoons, including South Harbor, were artificially created by defendant.

South Harbor, which was dredged in 1955, is approximately 7 to 11 feet deep at low water, 125 feet wide and about one-half a mile in length; it connects at its northwest extension with Back Thorofare and terminates at its southeast extension perpendicularly to Bay Avenue.

That portion of Plan Six which lies to the northeast of South Harbor (the Northeast Sector) encompasses six finger lagoons and seven building lots developed by defendant between 1965 and 1968; and, except for occasional maintenance dredging and the construction of houses and dock facilities, it is now largely completed.

That portion of Plan Six which lies to the southwest of South Harbor (the Southwest Sector) encompasses two and one-half building lots, the three remaining finger lagoons and a large rectangular area (the Rectangle) which defendant intends to convert into three building lots and two lagoons. The proposed development of the Southwest Sector contemplates the creation of five and one-half fairly uniform, artificially-filled building lots, essentially parallel to, and separated by, five completely bulkheaded, manmade lagoons perpendicularly radiating from South Harbor in the northeast and terminating at Tennessee Avenue in the southwest. The actual development of this sector was commenced sometime after March 1971. On April 23, 1971, and on numerous occasions thereafter, officials of the ACOE directed defendant to cease and desist its development activities. Notwithstanding these directives, defendant continued to develop the Southwest Sector until this Court on September 11, 1972, enjoined further development pending disposition of the present litigation.

The present status of this development is as follows:

Parallel to Bay Avenue and adjacent to the one-half building lot which separates it from Bay Avenue is Marcus Harbor, a completely dredged lagoon approximately 125 feet wide, 550 feet long and 9 feet deep at low tide. It has a bulkhead on its southeast exposure to the one-half building lot and a bulkhead on its northwest exposure to a full building lot. At a

right angle to the latter bulkhead there exists another bulkhead which runs in a northwesterly direction along approximately ninety percent of the lot's South Harbor exposure.

Immediately to the northwest of this lot is Tonga Harbor, a completely dredged but as yet unbulkheaded lagoon, approximately 125 feet wide, 550 feet long and 11 feet deep at low tide. On its northwest, Tonga Harbor is bordered by the Rectangle, which extends northwestward to Cayman Harbor—the northwesternmost lagoon in the Southwest Sector. Cayman Harbor has a narrow backward width and a width of about 187 feet at its mouth; it is approximately 550 feet long and, at low tide, has a depth of 5 feet near its mouth. It is bulkheaded along its northwest exposure to a building lot which fronts on Back Thorofare, and along its southeast exposure to the Rectangle there is a bulkhead which perpendicularly connects at its northeast terminus with a partially-constructed bulkhead that runs approximately 250 feet southeast along South Harbor to a point where defendant has begun dredging one of the two lagoons it proposes to create in the Rectangle.

The Rectangle itself is almost entirely diked around its perimeter by an embankment comprised of dredge spoils deposited there by defendant in connection with its development of the Southwest Sector. In addition to creating this dike, defendant has filled the area behind it with dredge spoils that defendant's engineer testified were "sucked up through [a] dredge and pumped out a pipe and deposited on the fill area." The water which accompanied this process as well as those dredge spoils known as fines, which did not settle out onto the fill area, were discharged into Cayman Harbor through four 12-inch runoff pipes. These pipes protrude through the dike that runs along the

southeast side of Cayman Harbor. According to defendant's witnesses, as a result of this discharge Cayman Harbor, which was once completely dredged, has become "unusable as far as boats are concerned; it has to be dredged again." Cayman Harbor now has a depth of zero in the area of the discharge pipes.

Since the time of their creation, all of the lagoons in Plan Six have been navigable in fact, and most have supported various-sized crafts, including fifty-foot ocean-going vessels, as well as, pile drivers and dredges of substantial size. With the exception of periodic obstructions attributable to defendant's dredge, fill and construction activities, they continue to be navigable. These obstructions to navigation result from a number of sources, including: bank failures or dike "blow-outs", *i.e.*, the collapse of dikes into the water, which occur because defendant has overburdened the fill area with dredge spoils; the erosion of dredge spoils defendant has placed on the banks of these waters due to rain, tides and run-off; defendant's direct discharges of dark sludge material into South Harbor and Cayman Harbor; and the presence of defendant's equipment which has blocked South Harbor during work days.

Such occurrences have frequently caused substantial impediments to navigation. On one occasion a "blow-out" of a dike caused the shoaling of South Harbor to such an extent that it required six weeks of dredging before boats could again pass. During that time, several persons damaged their boats trying to get into the Harbor. Similar obstacles caused by defendant have rendered other lagoons in Plan Six useless for navigation and may, in the future, adversely affect other lagoons as well as the Inland Waterway.

[1] South Harbor and its radiating finger lagoons comport in all critical respects with the criteria of

navigability established by the United States Supreme Court and are, without question, part of the navigable waters of the United States. *See United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407, 409, 61 S.Ct. 291, 85 L. Ed. 243 (1940); *United States* v. *The Steamer Montello*, 87 U.S. (20 Wall.) 430, 441, 22 L. Ed. 391 (1874); *United States* v. *The Steamer Montello*, 78 U.S. (11 Wall.) 411, 29 L. Ed. 191 (1871); and *The Steamer Daniel Ball* v. *United States*, 77 U.S. (10 Wall.) 557, 563, 19 L. Ed. 999 (1871). Also, *see United States* v. *Banister Realty Co.*, 155 F. 583, 588–593 (E.D.N.Y. 1907). These waterways are susceptible of being used in their ordinary condition as highways for commerce. *The Daniel Ball, supra* 77 U.S. at 563. And, even when they are obstructed by defendant's activities they are, by reasonable improvement, available for navigation within the meaning of the rule of *United States* v. *Appalachian Electric Power Co., supra. See Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 118, 41 S. Ct. 409, 65 L. Ed 847 (1921); *Rochester Gas and Electric Corp.* v. *FPC*, 344 F. 2d 594, 596 (2d Cir.), *cert. denied*, 382 U.S. 832, 86 S. Ct. 72, 15 L. Ed. 2d 75 (1965); and *Davis* v. *United States*, 185 F. 2d 938, 943 (9th Cir.), *cert. denied*, 340 U.S. 932, 71 S. Ct. 495, 95 L. Ed. 673 (1950).

[2, 3] In addition, Plan Six itself is part of the navigable waters of the United States for the reason that until it was illegally filled in 1927 by defendant's predecessor in title, it was a wetlands area, having an overall elevation below mean high-water, which was interlaced with substantial rivulets regularly flowed by the tides. *See United States* v. *Rands*, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967); *United States* v. *State of Washington*, 294 F. 2d 830 (9th Cir.), *cert. denied*, 369 U.S. 817, 82 S. Ct. 828, 7 L.

Ed. 2d 783 (1962); and *United States* v. *Joseph G. Moretti, Inc.*, 331 F. Supp. 151 (S.D. Fla. 1971). The fact that this area has been illegally filled does not extinguish its character, in legal contemplation, as part of the navigable waters of the United States, for an area once found to be part of those waters remains so. *See United States* v. *Appalachian Electric Power Co., supra,* 311 U.S. at 408, 61 S. Ct. 291; *George* v. *Beavark, Inc.*, 402 F. 2d 977, 978 (8th Cir. 1968); *Rochester Gas and Electric Corp.* v. *FPC, supra;* and *Davis* v. *United States, supra.* Also, *see Economy Light & Power Co.* v. *United States, supra,* 256 U.S. at 118, 41 S. Ct. 409.

[4] Because Plan Six is part of the navigable waters of the United States the Government is entitled, by virtue of an absolute dominant servitude which can be asserted to the exclusion of any other competing or conflicting power over such waters, to regulate its use. *See United States* v. *Virginia Electric Co.*, 365 U.S. 624, 81 S. Ct. 784, 5 L. Ed. 2d 838 (1961); *United States* v. *Twin City Power Co.*, 350 U.S. 222, 76 S. Ct. 259, 100 L. Ed. 240 (1956); *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 249, 74 S. Ct. 487, 98 L. Ed. 686 (1954); and *Gilman* v. *Philadelphia,* 70 U.S. (3 Wall.) 713, 724, 18 L. Ed. 96 (1865).

As part of its regulatory scheme respecting navigable waters, Congress enacted 33 U.S.C. § 403 [1] which

[1] In its entirety this statute provides: *Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in*

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any

prohibits such activities as those in which defendant has engaged in Plan Six, in the absence of an appropriate permit from the Secretary of the Army.

Contrary to defendant's unpersuasive assertions that the ACOE's actions and communications over the course of the last 24 years misled it into believing that it was not required to secure a permit for its operations in Plan Six, the testimony regarding these assertions plainly demonstrates that defendant was aware of this requirement as early as 1949, and that it most certainly knew, at the commencement of its activities in the Southwest Sector, that it needed a permit to develop Plan Six. Nonetheless, it never completed an application for, nor did it ever receive, an appropriate permit to work in this area.

Defendant did receive a federal permit to dredge access channels in the area fronting on the proposed site of South Harbor; however, that application is not pertinent to the issues here under consideration because defendant knew, or should have known, this permit to be of limited scope and duration.

[5, 6] Except for that federal permit which allowed defendant to dredge access channels in front of what is now the entrance to South Harbor, defendant has not obtained any federal permits for its dredge, fill

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port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

and construction activities in this area, nor have the communications between defendant and the ACOE, over the course of the last 24 years, in any way obviated defendant's obligation to obtain such permits in respect to those activities. Moreover, even assuming that defendant was somehow misled by the ACOE, the Federal Government cannot be prevented from exercising its authority over the navigable waters of the United States by reason of estoppel, laches or private expenditures founded upon mistaken assumptions. *United States* v. *California,* 332 U.S. 19, 39–40, 67 S. Ct. 1658, 91 L. Ed. 1889, Opinion Supplemented, 332 U.S. 804, 68 S. Ct. 20, 92 L. Ed. 382, reh. den., 332 U.S. 787 (1947), pet. den., 334 U.S. 855, 68 S. Ct. 1517, 92 L. Ed. 1776 (1948).

[7] The defense of a denial of equal protection in the inconsistent enforcement of the statutes under which this action was brought is totally lacking in merit. Defendant has not in any way substantiated its claim that the Government arbitrarily singled it out for selective enforcement action. *See generally Oyler* v. *Boles,* 368 U.S. 448, 454–456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). On the contrary, the proofs clearly demonstrate that the Government has administered these laws with complete impartiality and that it has acted to insure compliance with their provisions by all known violators.

[8] Defendant argues that the Government established federal harbor lines or ratified State harbor lines and that as a result it was relieved of the requirement to obtain a permit for work done shoreward of those harbor lines. This is incorrect in fact and in law. The Federal Government has not established harbor lines in the Back Thorofare area, nor has it, otherwise, ratified or adopted whatever State harbor lines may exist in this area. The presence

of federal harbor lines, however, is irrelevant to the requirement of obtaining an appropriate federal permit for work in navigable waters.

[9] Inasmuch as its dredge, fill and construction activities have obstructed, altered and modified the course, location, condition and capacity of Back Thorofare, South Harbor and the finger lagoons which radiate from South Harbor without having obtained proper authorization from the Secretary of the Army, defendant has violated 33 U.S.C. § 403. The enforcement provisions respecting 33 U.S.C. § 403 are contained in 33 U.S.C. § 406.[2] That statute specifically authorizes the district court to order injunctive relief to abate such violations.

The Government, here, seeks a statutory injunction pursuant to 33 U.S.C. § 406. Such applications are considered differently from those made pursuant to Rule 65 of The Federal Rules of Civil Procedure. *SEC* v. *Globus International Ltd.*, 320 F. Supp. 158 (S.D.N.Y. 1970). The Supreme Court consistently has held that where the activity against which the injunction is sought constitutes a violation of a federal statute, the

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[2] Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

public interest should bear more than traditional weight upon the deliberations of the court, even to the point of slackening the customary equitable criteria. *See United States* v. *United Mine Workers of America,* 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947); *Hecht Co.* v. *Bowles,* 321 U.S. 321, 64 S. Ct. 587, 88 L. Ed. 754 (1944); *United States* v. *City & County of San Francisco,* 310 U.S. 16, 60 S. Ct. 749, 84 L. Ed. 1050 (1940); *Virginian Ry.* v. *System Federation No. 40,* 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937); and 7 MOORE, FEDERAL PRACTICE, ¶ 65.04[1], at 65–45.

[10] Other federal courts have even further restricted the application of the traditional equitable criteria usually considered in Rule 65 applications, in cases involving statutes which specifically provide for injunctive relief. Where, as here, the activity sought to be enjoined is a violation of a statute, and the statute makes specific provision for injunctive relief, plaintiff need not show irreparable injury to enjoin the violation. This principle has enjoyed wide application involving many different statutes.[3]

Because 33 U.S.C. § 406 makes specific provision for injunctive relief against violations of 33 U.S.C. § 403, the Government need not demonstrate irrepara-

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[3] *See, e.g., ICC* v. *Consolidated Freightways,* 41 F. Supp. 651 (D.N.D. 1941) (the Interstate Commerce Act); *SEC* v. *Globus International Ltd., supra* (the Securities Act of 1933); *Lenroot* v. *Interstate Bakeries Corp.,* 146 F. 2d 325 (8th Cir. 1945) (the Fair Labor Standards Act of 1938); *Shadid* v. *Fleming,* 160 F. 2d 752 (10th Cir. 1947) (the Emergency Price Control Act of 1942); *Shafer* v. *United States,* 229 F. 2d 124 (4th Cir. 1956) (the Agricultural Adjustment Act of 1938); *Meter* v. *3 M Co.,* 273 F. Supp. 659 (D. Minn. 1967) (the National Labor Relations Act); *FTC* v. *Rhodes Pharmacal Co.,* 191 F. 2d 744 (7th Cir. 1951) (The Federal Trade Commission Act); and *United States* v. *Ingersoll-Rand Co.,* 218 F. Supp. 530 (W.D. Pa. 1963) (the Clayton Act).

ble injury to secure an injunction; it is only required to prove that the statute has been violated. *See Hecht Co.* v. *Bowles, supra; NLRB* v. *Aerovox Corp.,* 389 F. 2d 475 (4th Cir. 1967); *United States* v. *Town of Brookhaven,* 2 ERC 1761 (E.D.N.Y. 1971); and *SEC* v. *Globus International Ltd., supra.* The Government has proved defendant's repeated violations of 33 U.S.C. § 403 and is, therefore, entitled to a permanent statutory injunction interdicting a continuation of defendant's dredge, fill and construction activities in Plan Six.

[11] In addition, because defendant has disposed dredge spoils to the various lagoons in Plan Six and to the Inland Waterway by means of direct discharge, erosion from the banks and fill areas, and the collapse or "blow-out" of dredge-spoil dikes it has violated 33 U.S.C. § 407. *See United States* v. *Standard Oil Co.,* 384 U.S. 224, 227–230, 86 S. Ct. 1427, 16 L. Ed. 2d 492 (1966).

[12] Inasmuch as these activities adversely affect the navigable waters of the United States by, among other things, impairing the commercial, navigational and recreational use of these waters, and, inasmuch as they constitute an unlawful encroachment upon the public domain, defendant's activities amount to a public nuisance in violation of federal common law and, as such, are subject to abatement at the instance of the Government. *See Illinois* v. *City of Milwaukee,* 406 U.S. 91, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972); *New Jersey* v. *New York City,* 283 U.S. 473, 51 S. Ct. 519, 75 L. Ed. 1176 (1931); *New York* v. *New Jersey,* 256 U.S. 296, 41 S. Ct. 296, 65 L. Ed. 937 (1921); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 238, 27 S. Ct. 618, 51 L. Ed. 1038 (1907); In re Debs, 158 U.S. 564, 65 S. Ct. 900, 39 L. Ed. 1092 (1895); *Denney* v. *United States,* 185 F. 2d 108 (10th Cir. 1950);

United States v. *United States Steel Co.*, 356 F. Supp. 556 (N.D. Ill. 1973); *Commonwealth* v. *S. Covington & C. St. R.R.*, 181 Ky. 459, 205 S.W. 581 (1918); and *Attorney General* v. *Richards*, 2 Anstr. 603, 3 Rev. Rep. 632 (Ex. 1795). Note, *Developments in the Law-Injunctions*, 78 Harv. L. Rev. 994 (1965).

[13] Alternatively, the United States is entitled to a permanent injunction because it has established that irreparable injury to the environment, commerce and recreation has and will result, if defendant is allowed to continue its operations.

ORDER

In accordance with the views expressed hereinabove, it is on this 13th day of June, 1973 hereby ORDERED, ADJUDGED and DECREED that defendant, Stoeco Homes, Inc., its directors, officers, agents, servants, employees, attorneys, successors and assigns and each of them, and all persons, firms, and corporations acting under, through or for it or in active concert or privity with it, be permanently enjoined and restrained from engaging in or permitting, suffering, or causing, directly or indirectly, any dredge, fill or construction operations in an area of Ocean City, New Jersey, bordered by Bay Avenue, Tennessee Avenue, Spruce Road and the Back Thorofare of the Intracoastal Waterway, without the prior recommendation of the Army Corps of Engineers and approval of the Secretary of the Army. No costs.

APPENDIX C

In the United States Court of Appeals for the Third Circuit

No. 73–1805

UNITED STATES OF AMERICA

v.

STOECO HOMES, INC., A CORPORATION, APPELLANT

(D.C. Civil Action No. 1335–72)

On Appeal from the United States District Court for the ——— District of New Jersey

Present: ALDISERT, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed June 13, 1973, be, and the same is hereby vacated and the cause remanded to the district court for the entry of a modified injunction in accordance with the opinion of this Court. The injunction, to the extent that it prohibits hydraulic dredging, shall remain in effect until the district court acts.

Attest:

THOMAS F. QUINN.
Clerk.

MAY 23, 1974.

APPENDIX D

In the United States Court of Appeals for the Third Circuit

No. 73–1805

UNITED STATES OF AMERICA, APPELLEE

v.

STOEGO HOMES, INC., A CORPORATION, APPELLANT

(D.C. Civil Action No. 1335–73)

Present: ALDISERT, GIBBONS and ROSENN, *Circuit Judges.*

ORDER

Appellee's petition for panel rehearing in the above entitled matter is hereby denied.

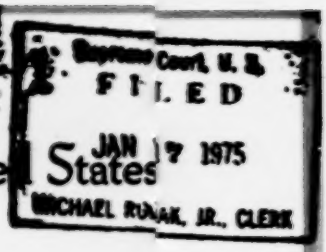
By the Court,

JOHN J. GIBBONS,
Circuit Judge.

Dated: JULY 31, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

SUPREME COURT, U. S.



Supreme Court of the United States

October Term, 1974.

No. 74-679.

UNITED STATES OF AMERICA,

Petitioner,

v.

STOECO HOMES, INC.,

Respondent.

On Petition for Writ of Certiorari.

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES
October Term, 1974.

No. 74-679.

UNITED STATES OF AMERICA,
Petitioner,

v.

STOECO HOMES, INC.,
Respondent.

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

I. SUPPLEMENTARY STATEMENT OF THE CASE.

(a)

The government petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in the case of the United States of America v. Stoeco Homes, Inc., entered on May 23, 1974. The opinion of the Court of Appeals is reproduced in Appendix A of the government's petition, and the judgment, in Appendix C.

The single question which the government desires to present on review, if granted, is stated in the petition as follows:

> "Whether a developer of a community adjacent to a navigable waterway must obtain a federal permit under

> Section 10 of the Rivers and Harbor Act of 1899, 33 U.S.C. 403, to excavate navigable lagoons extending the waterway to his lot fronts."

The question presented for review clearly fails to conform to Rule 23, 1(c), in that it is not expressed in the terms and circumstances of the case.

In view of the limited nature of the question the government proposes to present, it appears unnecessary to recite all the particular facts in the case at hand, but some facts beyond those given in the petition will be introduced as we proceed, for we are, of course, concerned with a particular controversy between the litigating parties, involving specific facts and circumstances.

(b)

An error on page 2 of the government's petition must first be noticed and corrected. It is there stated that in 1951 Stoeco obtained a federal permit "to excavate two canals *on* a filled salt marsh it owned in Ocean City, New Jersey." (Emphasis added.) If in place of the preposition "on" the preposition "to" is substituted, the error will be corrected. Stoeco intended to build a residential lagoon development on its tract of land, being the tract referred to in the government's petition as a "filled salt marsh." The first step would be to provide access ways from the channel of Back Thorofare (a part of Great Egg Harbor which, in turn, is a part of the Intercoastal or Inland Waterway) of sufficient depth to accommodate the boats of those who might become purchasers or occupants of houses in the development. In 1951 Stoeco obtained a federal permit to create two such access ways from the channel of Back Thorofare to its land, by deepening the Thorofare to a depth of 10 feet and for the required width. A considerable distance separates the two access

ways. From the landward terminus of one of the ways, Stoeco then excavated *on* its tract of land a lagoon it named Sunny Harbor. This lagoon and its immediate environs do not figure in this case, and drop out of view. From the landward terminus of the other access way, Stoeco in the year 1955 excavated *on* its tract of land a lagoon it named South Harbor, extending, for its greater part, in a straight line to a point near Bay Avenue. The permit did not cover any lagoon *on* Stoeco's land.

(c)

After the two access ways and the lagoon known as South Harbor were dug, and some bulkheading along South Harbor was installed, activities were suspended for a period of years, and when resumed Stoeco prepared a certain plan, which bears date April, 1965, for the area with which this case is concerned, entitled "Subdivision of Stoeco—Riviera Plan No. 6, Ocean City, Cape May County, N. J.," and at the trial it was introduced in evidence, and the expression "Plan Six" became a convenient term to identify the situs of the controversy.

Plan Six shows a number of proposed lagoons, sometimes referred to as finger lagoons, extending at right angles to South Harbor. Most of them run from Tennessee Avenue on the left side of the map to South Harbor, and continue on under the same names to Spruce Road on the right side of the map. By the time this litigation arose, all but two of these finger lagoons had been excavated and much bulkheading had been done. The two lagoons with which this case is concerned are known as Midway Harbor and Salvador Harbor, and indeed not the whole of these lagoons, for the segment of each of them to the right (on the map) of South Harbor had been completed before the Army Corps of Engineers intervened. To the left of South Harbor (on the map), that is, from South Harbor

to Tennessee Avenue, the proposed Midway Harbor had not been excavated at all, and only about 50 feet of Salvador Harbor had been excavated, and both lagoons remain in that condition because of the injunction.

Also because of the injunction, much bulkheading (to retain the earth of the sides of the lagoons in place) remains to be done, and removal of silt that has fallen at some places to the bottom of South Harbor and several other lagoons, or carried there by movement of water, during the excavation and dredging operations, remains to be done. In view of the limited scope of the question the government intends to present if certiorari is granted, we will avoid as much as possible any further reference to unfinished bulkheading and the silting and shoaling which have occurred and may occur if Stoeco is prevented from installing the bulkheads, for Stoeco has been prevented, by the injunction entered in the district court, from completing the bulkheading and removing the silt.

II. REASONS FOR DENYING THE WRIT.

(a)

Stoeco does not deny that it entered upon the excavation of South Harbor and the lagoons radiating from it without applying to the Army Corps of Engineers for a permit, or obtaining a permit from the Secretary of the Army. It believed that no federal permit was required for the proposed lagoons *on* its land.

In preparation for an earlier residential lagoon development, not far from the present premises in question, Stoeco had submitted to the Engineers a sketch showing the work it intended to do. By letter dated January 19, 1949, found in the footnote

on page 7a of the petition for certiorari, the District Engineer advised Stoeco as follows (second paragraph):

> "Inasmuch as no construction is contemplated channelward from the existing bulkhead at the locality and the dredging for a boat basin is shoreward from the line of the bulkhead, no Department of the Army permit for the work will be required."

With respect to South Harbor and the lagoons which radiate from it, they also lie inside the bulkhead line in that locality. From the evidence on the part of the government it appears that no federal government harbor lines (which include bulkhead lines) had ever been established in that area, and the government contended that the words "outside established harbor lines" as used in Section 10 should be read to mean "outside harbor lines established by federal authority," and that lines established by state or local authority are, in the present connection, of no significance, and are entitled to no recognition. The court of appeals dealt with this contention at some length (Appendix A, page 6a to page 10a under the heading "The §10 Violation"). We agree with the view and conclusion there expressed. Moreover, it appears to us, from the Question Presented in the petition for certiorari, that it is at least doubtful that the government persists in its contention.

(b)

Much of the reasoning employed by the government in support of its application for certiorari manifests failure to observe and give due and close attention to the language of the statute it invokes, namely, Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403.

The excavation of the two lagoons remaining undone in its project will not create an "obstruction * * * to the navigable capacity of any of the waters of the United States." In fact, and obviously, rather than obstructing the navigable capacity, it enlarges horizontally the range of navigability, for boats will then be able to sail where now is land.

Nor do the lagoons answer to the description of wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures.

But it may be said that upon the completion of the excavations (or upon progress toward completion) the water that enters will alter or modify the course, location, condition, or capacity of South Harbor and other lagoons, and, by extension of effect, Back Thorofare, the Intercoastal Waterway, Great Egg Harbor, and beyond to the open sea, or the channel of any navigable water, by lowering the water level of all these bodies of water resulting from the diversion of the quantity of water to fill the two lagoons to a depth of 10 feet. The plane measurements of each lagoon are 117 feet wide, and about 650 feet long. But the diversion will be made once only, and will not recur, and the source of the water diverted and its replenishment will be the nearby Atlantic Ocean. The theoretical or mathematical lowering of the water is utterly too small to effect the course, location, condition, or navigability of the connecting bodies of water which occupy the short and unimpeded distance between the lagoons and the ocean. The doctrine of de minimus can hardly ever be better exemplified and applied. Infinitestimal magnitudes may most appropriately, in practical affairs, be ignored.

(c)

At page 7 of the petition for certiorari it is said: "Similarly, as we have shown, Stoeco's excavation of lagoons changes the condition of the navigable waters to which they connect, through (among other things) washouts, deposits, and changes in traffic."

As to washouts, they occasionally occur by a break in the walls of the retaining dikes during the course of hydraulic dredging, and the deposits are those (1) which occur when some of the earth released by the break slides back or is carried back into the excavation until the break is repaired, and (2) the fines which do not sink behind the bikes, but flow back whence they came through the water run-off pipes, all as normally happens during a hydraulic dredging operation. Installation of bulkheads will permanently prevent the washouts and the deposits, and the dredging up and removal of the silt will correct the condition of shoaling at several places heretofore created, but the injunction imposed by the district court has prevented Stoeco from applying the remedies.

Like complaints were made on page 6 of the petition for certiorari, in this language:

> "Excavation of finger lagoons adjoining a harbor is as much an alteration of that body of water is is construction of a pier creating a similar increase of docking facilities. Indeed, it is a greater alteration because it physically changes the configuration of the water and bank, and, as the present case shows, creates a danger of washouts and other obstructions to navigation and lowered water quality."

Washouts and obstructions to navigation (shoaling, we presume) are temporary, until the work is completed, and eliminated

by bulkheading and dredging, as above shown. And the same can be said of lowered water quality, if any, caused by the silting.

(d)

At several places in the petition for certiorari, intimations, not at all veiled, are made that Section 10 can validly be utilized as an instrument to limit boat traffic. See page 7 ("changes in traffic"), page 8 ("these waterways are subject to heavy navigation"), and page 9 ("thus to increase the boat traffic"). We see nothing in Section 10 which suggests a design by its authors to discourage or limit boating upon the country's waters, and it can be said with confidence that in 1899 Congress foresaw no redundancy of boats on the waterways. If and when public welfare requires restrictive measures, we can be sure that any enactments to that end will be explicit and direct.

(e)

The government contends that the decision of the court of appeals in the case at hand is not in accord with applicable decisions of the Supreme Court, or conflicts with decisions of other courts of appeal. It also contends that the decision conflicts with the decisions of two district courts. But as to the latter, see Supreme Court Rule 19, 1(b), from which it is apparent that ordinarily, at least, certiorari will not issue in order to review a discordance between a court of appeals and a district court.

(f)

We now examine the decisions cited by the government in support of the reasons it assigns for granting the writ.

The case of *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655 (1973), was a penal proceeding for violation of §13 of the Rivers and Harbors Act of 1899, by discharging or depositing certain industrial wastes in navigable waters. The case has nothing in common with the case at hand, and apparently was cited only because the opinion contained this statement taken from earlier cases, that "the history of this provision and of related legislation dealing with our full-flowing rivers 'forbids a narrow, cramped reading' of §13," attributed to the two decisions referred to by the government on page 7 of its petition, namely, *United States v. Standard Oil Co.*, 384 U. S. 224, and *United States v. Republic Steel Corp.*, 362 U. S. 482. No one can fail to agree with the admonition against a narrow or cramped reading of any remedial statute. The decision of the court of appeals in the instant case, however, by no meaus was the product of that kind of reading of Section 10.

In the case of the *Sanitary District of Chicago v. United States*, 266 U. S. 405 (1924), the Sanitary District had been authorized, pursuant to law, by the Secretary of War, to withdraw from Lake Michigan, by means of an artificial canal, up to 250,000 cubic feet of water per minute, but withdrew as much as from 400,000 to 600,000 cubic feet a minute. The United States brought suit to enjoin the excessive withdrawal, alleging that it had lowered and would lower the level of the water of all the Great Lakes (except Lake Superior) and their associated rivers, including the Niagara River and the St. Lawrence River. An injunction issued, and the Supreme Court affirmed. The case differs too greatly from the instant case to be offered here. In the first place, the diversion of the water from the Lake would be continuous and go on forever. In the case at hand, the diversion would be a single event, and not ever repeated, for the system in the cited case was open at both ends, while here the system is closed at the end of the lagoons, with

no outlet for the water to flow beyond and away. Additionally, of course, and as already observed, in relation to the immensity of the other bodies of water comprising our system, the water here withdrawn cannot, except in a mathematical context, be regarded as lowering the level of the waters, and cannot even in that context be conceived as impairing navigability of any portion of that system by any boat fashioned by man.

The case of *United States v. Joseph G. Moretti, Inc.*, 478 F. 2d 418 (5th Cir. 1973), cited by the government, rather than being similar to the instant case is directly opposite, and the decision here does not conflict in principle with the decision in that case. In that case the developer dumped a huge quantity of earth material into navigable water in order to form building lots. In the case at hand the developer (Stoeco) desires to excavate and remove land in order to extend navigability, as heretofore remarked.

The case of *United States v. Perma Paving Co.*, 332 F. 2d 754 (2d Cir. 1964), cited by the government, is irrelevant to the issue the government desires to present as disclosed by the Question Presented. There by overloading a dump adjacent to navigable waters, the ground was caused to give way, and a large quantity of earth or fill to be pushed or fall into the water, to the impediment of navigation. Although in the case at hand, in the course of the hydraulic dredging of lagoons, but unintentionally, some earth materials did fall back into the already dug lagoons and caused some shoaling, as previously explained, Stoeco desires to remove it and eliminate the shoaling, but has been prevented by the stringent injunction imposed by the district court. Indeed, in our brief filed with the court of appeals, we asked for relief from the permanent injunction as follows:

> (3) Revision of the injunction so as to permit the defendant to complete all the bulkheading not already done in and along the existing lagoons and Tennessee Avenue;

(4) Revision of the injunction so as to permit the defendant to dredge out the sediment which fell into South Harbor and Caymen Harbor (and any other lagoon) and caused shoaling as the result of defendant's dredge and fill operation, and so to restore the bottoms to their regular depth.

At page 8 of the petition for certiorari the government calls attention to two cases decided by district courts in 1974 with which the decision of the court of appeals in the case at hand is said to conflict. In the opinion in each case the facts are but meagerly given. In the first case, *United States v. Warren C. Wichard*, E.D.N.C., No. 797, it appears that the defendant, without a federal permit, excavated two canals on his property and connected them with the Pamlico River, a navigable river, thereby diverting water from it. Although it is not so stated, we think it permissible to infer that (as in the above case of *Sanitary District v. United States*) water would flow continuously from the river into the canals, and the water would therefore be irretrievably lost to the river forever, and in time a substantial change in the condition of the river would ensue. If for no other reason, that case and the present case differ too significantly for a conflict of decision to be perceived. In the second of the cited cases, *United States v. Edward W. Mitchell*, D.S.C., Civil No. 73-1125, it appears that the defendant, without a federal permit, excavated a canal in the bottom of Lake Marion (presumably a navigable body of water) beginning at a point more than 900 feet below the line of the normal level of the lake, and had extended the canal shoreward and inland of the usual boundary or shore line of the lake. The court ordered the defendant to refill and restore to normal that portion of the canal from a designated point below the shore line and beyond, to

the inland place of ending of the canal. In the case at hand, the proposed creation of the two new lagoons will not entail any excavation of or from the bottom of any existing navigable waters, and so, likewise, no conflict of decision can be seen.

III. CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES A. COHEN,
On the Brief.

Dated, January 8, 1975.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-679

UNITED STATES OF AMERICA, PETITIONER

v.

STOECO HOMES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Involved here is a "finger canal" development, characteristic of many that have been proposed or constructed along the coastal and inland waterways of New Jersey and Delaware and other coastal states. Whether the developers of these communities are required to obtain federal permits[1] before dredging navigable lagoons that connect with the adjacent navigable waterways is, as we stressed in our petition, a question of considerable importance. For if the decision below stands, federal protection of these navigable waterways will seriously diminish.

Respondent, in its brief in opposition, does not actually dispute the significance of the issue we bring to the Court. Rather, respondent suggests that in light of the facts and

[1]Under Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 403.

circumstances of this particular case, the court of appeals decided it correctly by holding that no federal permit was required under Section 10 of the 1899 Rivers and Harbors Act. While admitting that it did not apply for a federal permit when it began excavating the lagoons,[2] respondent argues that regardless of the scope of Section 10, regulations and practices of the Army Corps of Engineers at the time (1965) did not require a permit because the excavations were shoreward of various bulkheads (Brief in Opp. 4-5).

But such permits were required then (and are required now) and respondent was not misled into believing the contrary. Rejecting respondent's contention that it had been misled, the district court found (Pet. App. 32A):

> Contrary to defendant's unpersuasive assertions that the ACOE's actions and communications over the course of the last 24 years misled it into believing that it was not required to secure a permit for its operations in Plan Six, the testimony regarding these assertions plainly demonstrates that defendant was aware of this requirement as early as 1949, and that it most certainly knew, at the commencement of its activities in the Southwest Sector, that it needed a permit to develop Plan Six. Nonetheless, it never completed an application for, nor did it ever receive, an appropriate permit to work in this area.

The district court also found that (*id.* at 33A):

> The federal government has not established harbor lines in the Back Thorofare Area [the area in question] nor has it, otherwise, ratified or adopted whatever State harbor lines may exist in this area. * * *

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[2]Brief in Opp. 4: "Stoeco does not deny that it entered upon the excavation of South Harbor and the lagoons radiating from it without applying to the Army Corps of Engineers for a permit, or obtaining a permit from the Secretary of the Army."

Although expressing some doubt about the trial court's findings in this regard,[3] the court of appeals nevertheless assumed them to be correct and rested its decision on the broader ground that Section 10 of the Rivers and Harbors Act does not apply to excavation on fast land even though those excavations join and become part of the navigable waters of the United States. As we argued in our petition, however, such excavations "'alter or modify the course, location, condition or capacity' * * * of the navigable waters to which they connect, through (among other things) washouts, deposits and changes in traffic" (Pet. 6-7).

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[3]The court of appeals discussed whether a regulation in effect before 1970 (33 C.F.R. (1962 ed.) 209.150) allowed excavation shoreward of existing "harbor lines" without a permit (Pet. App. 9A-10A). Although there were no federally-established harbor lines in existence with respect to the area involved here, the court below thought the regulation might apply in any event because it "appears to refer to actual harbor lines established by any authority" and here respondent's excavation were shoreward of "some harbor lines" (*id.* at 9A).

However, contrary to the court of appeals' suggestion, the regulations referred only to federally-established harbor lines and excavations seaward of such lines. The first subsection of the regulation (33 C.F.R. (1962 ed.) 209.150(a)(1)) spoke of the "harbor lines to be established" by the Secretary of the Army and a later subsection (Section 209.150(g)) authorized the modification of any "harbor line" only in accordance with federally-established procedures.

Moreover, if there had been a federal harbor line in existence, this line, in the words of the regulation then in effect,

> does not imply consent to operations of every kind landward of the line. Such work as dredging for instance may seriously interfere with the regimen of the waterway and will ordinarily require the authorization of the Department to insure that operations are conducted under proper restrictions.

33 C.F.R. (1962 ed.) 209.390, subsequently renumbered 33 C.F.R. 209.150(i)(1), revoked May 27, 1970. The current regulation, 33 C.F.R. (1974 ed.) 209.150(b), was promulgated May 27, 1970, and is even more explicit. (Much of the dredging and filling at issue here began "sometime after March 1971" (Pet. App. 27a).)

It is no answer to say, as respondent does (Brief in Opp. 6), that its excavations only increased and did not obstruct the navigable capacity of the harbor in question. The first sentence of Section 10 prohibits any obstruction to navigable water without the affirmative authorization of Congress. But the remainder of Section 10 makes it unlawful "* * * to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity * * *" of such waters without the approval of the Corps of Engineers. Regardless of whether the alteration would increase or decrease the navigable capacity—or whether the result of the alteration is or is not desirable—a federal permit must be obtained. Otherwise the decision is solely in the hands of the developers whose desires do not always coincide with the public interest that should be taken into account when navigable waters (and the traffic patterns on them) are affected. Thus, whether developers may make such inland alterations to navigable waterways as they choose, without the consent of Congress or the Corps of Engineers, is at the heart of this case and that, we submit, is an issue worthy of this Court's consideration. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1975.